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A/CN.4/L.293

Draft articles on State responsibility: text of article 29 proposed by Mr. Ushakov - reproduced in A/CN.4/SR.1544, para. 5

Topic:

State responsibility

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23. In the *Savarkar* case referred to by Mr. Francis, the arbitral tribunal had not said that there had been no irregularity. It had only said that the British authorities had been under no obligation to return Savarkar, since a French police officer had consented to his arrest. Whether the police officer had been right or wrong in giving his consent was another matter.

24. He quite understood what was worrying Mr. Njenga, but he thought it would be more dangerous to remain silent than to try to prevent abuses by a well-drafted article. The second part of Mr. Njenga's proposal had convinced him that it was possible to qualify consent rigorously in order to prevent improper interpretations. On the other hand, it seemed difficult to say that the consequences of a wrongful act were not actionable, since it was not the consequences of the wrongful act that were precluded by consent, but the wrongfulness itself.

25. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article 29 to the Drafting Committee.

It was so decided. [5]

Drafting Committee

26. Mr. RIPHAGEN (Chairman of the Drafting Committee) proposed that the Drafting Committee should consist of the following members: Mr. Barbosa, Mr. Francis, Mr. Njenga, Mr. Ushakov, Mr. Quentin-Baxter, Mr. Reuter, Mr. Schwebel, Mr. Sucharitkul, Mr. Tsuruoka, Mr. Verosta and Mr. Yankov, it being understood that Mr. Dadzie, as Rapporteur of the Commission, was an *ex officio* member of the Committee.

27. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to accept Mr. Riphagen's proposal.

It was so decided.

The meeting rose at 12.40 p.m.

[5] For consideration of the text proposed by the Drafting Committee, see 1567th meeting, paras. 1, 6, 7 and 40–49.

1544th MEETING

Friday, 1 June 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yankov.

Also present: Mr. Ago.

Fifteenth session of the Seminar on International Law

1. The CHAIRMAN invited Mr. Raton, Senior Legal Officer in charge of the Seminar on International Law, to address the Commission.

2. Mr. RATON (Secretariat) said that the International Law Seminar would hold its fifteenth session from 5 to 22 June 1979. The Selection Committee, which had met at the end of April, had chosen 22 candidates, and two further participants were being sent by UNITAR.

3. In 15 years, 330 participants from 102 different countries had attended the Seminar, and 137 of them had been awarded fellowships by various Governments. For 1979, the Governments of Austria, Denmark, the Federal Republic of Germany, Finland, Kuwait, the Netherlands, Norway and Sweden had awarded fellowships in amounts ranging from $815 to $10,260. Partly as a result of the generosity of the Norwegian Government, which had more than trebled its usual contribution, the sum of $32,000 was available to the Seminar that year for distribution among about 10 candidates.

4. As every year, the Seminar would be organizing a series of lectures, which would be delivered by Sir Francis Vallat (The Vienna Convention on Succession of States in respect of Treaties); Mr. Ushakov (The most-favoured-nation clause); Mr. van Boven, Director of the Division of Human Rights (United Nations efforts to promote and protect human rights); Mr. Reuter (Narcotics and international law); Mr. Pinto (The development of customary international law through United Nations conferences); Mr. Sucharitkul (The crystallization of norms relating to the jurisdictional immunities of States and their property); Mr. Ferrari Bravo, Chairman of the Sixth Committee of the General Assembly (The work of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization); Mr. Bedjaoui (Legal aspects of the New International Economic Order); Mr. Francis (The Commodity Producers' Association within the framework of the New Economic Order); and Mr. Njenga (The United Nations Conference on the Law of the Sea).

State responsibility (*continued*) (A/CN.4/318 and Add.1–3, A/CN.4/L.291, A/CN.4/L.292, A/CN.4/L.293)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 29 (Consent of the injured State) [1] (*concluded*)

5. Mr. USHAKOV proposed that draft article 29 should be replaced by the following text (A/CN.4/L.293):

[1] For text, see 1537th meeting, para. 25.

"*Lawfulness by consent*

"The consent of a State, valid in accordance with international law, to a particular act of another State not in conformity with the obligation of the latter State towards the former State precludes the wrongfulness of the act in question if it is in conformity with the said consent."

6. The expression "valid in accordance with international law" made it possible to exclude all cases in which consent was not valid (consent given under duress, consent to the violation of an obligation deriving from a *jus cogens* rule or from a restricted multilateral treaty, etc.) without enumerating them, for the Commission was not at present required to define the conditions for validity of consent.

7. Sir Francis VALLAT trusted that Mr. Ushakov's proposal, which might do much to dispel his own concern in regard to draft article 29, would receive the Drafting Committee's careful consideration.

ARTICLE 30 (Legitimate application of a sanction)

8. The CHAIRMAN invited Mr. Ago to introduce Article 30 (A/CN.4/318 and Add.1–3, para. 99), which read:

Article 30. Legitimate application of a sanction

The international wrongfulness of an act not in conformity with what would otherwise be required of a State by virtue of an international obligation towards another State is precluded if the act was committed as the legitimate application of a sanction against that other State, in consequence of an internationally wrongful act committed by that other State.

9. Mr. AGO said that the second circumstance to be considered among possible grounds for precluding the wrongfulness of an act of the State was the legitimate exercise or application of a sanction. In other words, an act of the State which was not in conformity with what would be required of it by a binding international obligation towards another State was not internationally wrongful if it constituted the application to that other State of a measure admissible in international law as a sanction in response to an international offence committed by the latter.

10. The term "sanction" should not be understood in too narrow or too broad a sense. The idea of a sanction should not be reduced to the use of armed force in the context of a legal system regarded as repressive; but neither should it cover every possible legal consequence of an internationally wrongful act, including the right to obtain reparation for damage sustained.

11. The application of the sanction must also be "legitimate". Admittedly, that adjective might seem superfluous, since it was obvious that a sanction whose application was not legitimate could not be described as a sanction in accordance with international law. But to avoid abuses, he thought it necessary to specify in the body of the article that, to preclude wrongfulness, the application of the sanction must be legitimate in the specific case considered. It was in the same spirit that he had proposed, in article 29, that it should be stressed that consent must be "valid" (1543rd meeting). A whole series of internationally wrongful acts in fact existed which, under international law, did not justify recourse to sanctions, but only created the right to claim reparation for the damage sustained. In such cases, the injured State could legitimately resort to measures of sanction only if it had not succeeded in obtaining reparation.

12. Moreover, some kinds of measures, such as armed reprisals, which had been admissible under "classical" international law, were no longer tolerated by contemporary international law, or only within strict limits. The present tendency was to leave decisions on the application of measures involving the use of armed force to subjects other than the "injured" State—generally to an international organization that could entrust the application of the sanction to a member State, which then acted by virtue of a responsibility entrusted to it by the organization and not in its individual capacity. The use of armed force by the injured State would then remain wrongful, even if it was a response to an internationally wrongful act.

13. Moreover, armed reprisals, even if legitimate, would cease to be a legitimate form of sanction if they were not proportionate to the injury caused by the offence and if the rules of the humanitarian conventions were not observed. However, it was only in part II of the draft, when it sought to determine the forms, modalities and consequences of an internationally wrongful act, that the Commission would consider in which cases a sanction was to be regarded as legitimate or illegitimate.

14. In international case law between the two world wars, reprisals had been deemed legitimate provided they constituted a reaction to an internationally wrongful act and remained within certain limits. For example, in the award relating to the responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa (Naulillaa incident), rendered on 31 July 1928, the Portugal-Germany arbitration tribunal had held that an act of reprisal was "an act of taking the law into its own hands by the injured State,... in response—after an unfulfilled demand—to an act contrary to the law of nations by the offending State", the effect of which was "to suspend temporarily, in the relations between the two States, the observance of a particular rule of the law of nations", and that the reprisal "was limited by the experience of mankind and the rules of good faith applicable in the relations between States" and "would be illegal if an earlier act, contrary to the law of nations, had not furnished the motive". The tribunal had concluded that "the first requirement—the *sine qua non*—of the right to take reprisals is a motive furnished by an earlier act contrary to the law of nations".[2]

15. In its award relating to the responsibility of Germany for acts committed subsequent to 31 July 1914

[2] See A/CN.4/318 and Add.1–3, para. 86.